

CANADA / JUDGMENT

Imeri v. Janczukowski

2010 BCSC 1383

COURT

Supreme Court of British Columbia

DECIDED

30 September 2010

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2010 BCSC 1383 Imeri v. Janczukowski IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Imeri v. Janczukowski, 2010 BCSC 1383 Date: 20100930 Docket: M071295 Registry: Vancouver Between: Huljkije Imeri Plaintiff And Peter J. Janczukowski Uniwide Drilling Co. Limited Defendants Before: Master Shaw Reasons for Judgment Counsel for the Plaintiff: A.A. Vecchio Counsel for the Defendants: N. Hopewell Place and Date of Hearing: Vancouver, B.C. September 7, 2010 Place and Date of Judgment: Vancouver, B.C. September 30, 2010

- [1] This is an application by the defendants in a motor vehicle accident case to have the plaintiff attend and submit to an independent medical examination ("IME") by an orthopaedic surgeon, Dr. Robert McGraw, on September 21, 2010.
- [2] The application was heard on September 7, 2010, and on that date I gave my decision that pursuant to Rule 7-6 of the Rules of Court, the plaintiff attend for a further IME with an orthopaedic surgeon, but the IME will be conducted by the defendants' expert, Dr. Boyle, orthopaedic surgeon, who conducted the initial IME of the plaintiff on February 28, 2006. I advised that reasons for my decision would follow. The following are my reasons.

BACKGROUND

- [3] The plaintiff was involved in a motor vehicle accident on May 24, 2005. The plaintiff claims to have suffered injuries to her neck, shoulders, back, face, left arm, left hand, left hip, left thigh, left leg, left foot, headaches, fatigue, insomnia, anxiety and depression.
- [4] Prior to the writ being filed, the plaintiff was represented by legal counsel, and the defence was aware of this as of November 25, 2005.
- [5] The writ and statement of claim was filed on March 20, 2007.
- [6] At the request of the adjuster on behalf of the defendants, the plaintiff attended a medical examination with Dr. Boyle, orthopaedic specialist, on February 16, 2006. The letter from the adjuster to the plaintiff states the request was for the purposes of Part 7 of the Regulations.

- [7] The plaintiff attended and Dr. Boyle produced a report. The report was provided to the plaintiff on March 9, 2006. The defendants now seek an order for the plaintiff to attend with a second orthopaedic specialist.

ISSUES

- [8] The issues to be decided are:

- 1) should the court exercise its discretion to order the plaintiff attend for an IME with an orthopaedic specialist?
- 2) if yes, should the defence be entitled to have their chosen expert, Dr. McGraw, conduct the IME? POSITION OF THE PARTIES

- [9] The defence argues the plaintiff's attendance with Dr. Boyle was for the purposes of the Part 7 claim, and the defendants should now be entitled to have the plaintiff attend with their choice of orthopaedic specialist for the purposes of the tort claim.

- [10] The plaintiff argues she has already attended with an orthopaedic specialist retained by the defence. The plaintiff resists attending an IME with a second orthopaedic specialist.

- [11] The plaintiff argues that although the adjuster, when advising of the IME with Dr. Boyle, specified in her letter to the plaintiff the IME was for the purposes of the Part 7 claim, the examination was a first examination for the tort claim as well. As such, the plaintiff submits, if the defence is entitled to a second IME with an orthopaedic specialist, it should be with Dr. Boyle and not with a second orthopaedic specialist, Dr. McGraw.

- [12] The plaintiff submits the adjuster who requested the first IME was the adjuster for both the Part 7 claim and the tort claim. The plaintiff had received some Part 7 benefits prior to retaining counsel, but was not receiving any Part 7 benefits at the time the IME with Dr. Boyle was requested.

- [13] The reason set out by the adjuster for the IME was to "confirm the nature and extent of any injuries" the plaintiff sustained. The plaintiff argues the IME was, at the least, in part for tort purposes.

- [14] The plaintiff submits the defence has not disclosed the adjuster's instructions to Dr. Boyle. The plaintiff argues the report of Dr. Boyle contains opinion in areas which are irrelevant to a Part 7 claim, but which are relevant to a tort claim. This includes assumed facts of the plaintiff wearing a seatbelt and having a properly adjusted headrest; considerations that the impact was low velocity; considerations of quantum of damage to each of the vehicles involved; and opinion evidence on the disability of the plaintiff.

- [15] The defendants did not disagree that Dr. Boyle's report contains some issues that deal with the tort claim. However, the defendants say a report for the Part 7 claim was ordered and the specialist, Dr. Boyle, produced the report.

- [16] As noted, the letter of instruction from the adjuster to Dr. Boyle, was not produced.
AUTHORITY
- [17] Rule 7-6(1), which is the new Rule 30, provides as follows: Order for medical examination
- (1) If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make
- (a) an order respecting any expenses connected with the examination, and
- (b) an order that the result of the examination be put in writing and that copies be made available to interested parties of record.
- [18] In *Stainer v. Plaza*, 2001 BCCA 133, Finch J.A. (as he then was) said at para. 8: ... the purpose of Rule 30 is to put the parties on an equal footing with respect to medical evidence.
- [19] Although the first question would be whether the defence needs an IME of an orthopaedic specialist to put the parties on an equal footing with respect to medical evidence, counsel for the plaintiff did not oppose the plaintiff attending a defence IME with an orthopaedic specialist as long as it was Dr. Boyle. The plaintiff agrees to go back to Dr. Boyle for the IME.
- [20] The plaintiff's submission is that the plaintiff has already attended a first IME for tort purposes with Dr. Boyle and, if a further IME is appropriate, it should be a follow-up with the original expert for the defence.
- [21] In *Rowe v. Kim*, 2008 BCSC 1710, Master Keighley at para. 14 states: A party seeking to have a second examination preformed by a practitioner practicing in the same speciality or discipline as a practitioner who has already examined a person faces an uphill battle: *Hothi v. Grewal*, [1993] 45 B.C.L.R. (3d) 394 (SC); *Hamada v. Semple*, [1983] B.C.J. No. 1307 (SC). Successful applicants are those who are able to demonstrate that something has happened since the first examination which could not have been foreseen or which could not, for some other reasons, have been addressed by the first examiner. It also seems to me that material filed in support of the application should indicate why a further examination by the doctor who performed the original assessment is not appropriate.
- [22] The evidence submitted in this matter does not set out why it would not be appropriate to send the plaintiff back to Dr. Boyle. There was no evidence why Dr. McGraw should be preferred over Dr. Boyle.
- [23] The plaintiff does not resist seeing Dr. Boyle. It is not necessary to find sufficient reasoning for the further examination by Dr. Boyle.
- [24] I find the February 28, 2006 report of Dr. Boyle contains opinion relevant to both the Part 7 claim and the tort claim. The defence has not provided any evidence to explain the opinion content in the report relevant to the tort claim, other than the statement of the adjuster in her letter to the plaintiff setting the appointment that the IME is for the Part 7 claim

purposes. It is not known what the request or instructions to Dr. Boyle were. Based on the content of the resulting report, there is opinion relevant to the tort claim. I find the IME by Dr. Boyle on February 28, 2006 is a first examination by an orthopaedic specialist in the tort claim as well as for a Part 7 claim.

[25] The defence seeks an orthopaedic IME.

[26] The plaintiff will attend for a second IME with Dr. Boyle at a time and place to be arranged.

[27] Paragraph 2 in part 1 of the defendants' notice of application will also be ordered, that being: The solicitor for the Defendants shall promptly enter this Order and forthwith mail or deliver a copy to the solicitor for the Plaintiff; COSTS

[28] Costs are to the plaintiff in any event of the cause. "Master M.E. Shaw" MASTER SHAW

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